Saycon Construction Sdn Bhd v Rosado Tradeline Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(W)-1947–10 OF 2016

B

TENGKU MAIMUN, ABDUL RAHMAN SEBLI AND ZALEHA YUSOF JJCA

27 SEPTEMBER 2017

C

Contract — Building contract — Subcontract — Claim under subcontract — Allegation that subcontractor was negligent and did not carry out works to rectify defects — Claim by main contractor — Whether claim substantiated with evidence — Whether subcontractor appointed for entire contract — Whether quantum awarded by trial judge appropriate — Whether correct in fact and in law

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The respondent ('the plaintiff') was appointed as the main contractor by Ann Joo Integrated Steel Sdn Bhd ('the employer') for the construction of a project. The plaintiff appointed the appellant ('the defendant') as its subcontractor for the said project. The plaintiff received RM4,404,350.32 from the employer while the plaintiff paid the defendant the amount of RM1,863,629.57 under the subcontract. The plaintiff claimed against the defendant at the High Court for damages for breach of contract, alleging that the defendant: (a) was negligent in carrying out the subcontract works; (b) had a poor workmanship; (c) wrongfully suspended the works; and (d) refused to rectify defective works and abandoned the works. Consequently, the plaintiff suffered losses and had to engage a third party to rectify the defective works and to complete the project. Refuting the claim, the defendant argued that they were not the subcontrator for the whole project but were only appointed by the plaintiff to supply labour for concrete pour and rebar works and these subcontract works were 90% complete. The defendant counterclaimed for the sum of RM1,440,388.93 and/or general damages. The High Court judge held that the defendant was appointed by the plaintiff as subcontractor for the entire project and the delay was solely caused by the defendant's acts and other works. Hence the present appeal by the defendant against the quantum. The issue that arose for the court's adjudication was whether the various amounts order by the judge to be paid by the defendant to plaintiff could be sustained as being correct in law or fact.

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Held, allowing appeal in part:

(1) There was a breach of natural justice as the defendant was not accorded the opportunity to rebut the plaintiff's further submission and clarification on the amount, especially when the judge had made a

finding that there was no evidence to substantiate the plaintiff's claim for damages. Nevertheless, this issue in itself did not vitiate the awards made by the judge (see para 34).

(2) The trial judge erred in awarding reasonable compensation to the plaintiff in the sum of RM338,585. Given that the judge had made a finding that the plaintiff had not proved the claim for damages, the award of RM338,585 for reasonable compensation had no basis and was wrong in fact and in law (see paras 43–44).

(3) In respect of cofferdam, the judge found that the design of the sheet pile cofferdam formed part of the defendant's contractual obligation under the subcontract and that the defendant had abandoned the construction of the cofferdam. The judge further found that the defendant was negligent in carrying out the construction of the ore bunker. There was no compelling reason to disturb the finding of the judge. The finding was not perverse but supported by evidence. The judge allowed the sum of RM849,376.01 as pleaded, having found that this claim was supported by delivery orders and invoices. There was no reason to disturb the judge's award for the item of cofferdam (see paras 45–46 & 48).

(4) The judge awarded the sum of RM201,057 being excess payment made by the plaintiff to the defendant under threat. However, in the evidence, there was absolutely no mention of any threat or coercion by the defendant in respect of payment of RM201,057. The police reports were lodged months later by the plaintiff. There was evidence that there was no physical threat for the plaintiff to make payment. This piece of evidence that the defendant dare not inflict any physical violence negated the element of threat (see para 51).

(5) A sum of RM102,678 and RM15,800 was awarded by the judge for the tilted piles and columns respectively, which essentially were costs to rectify the defective works of the defendant. Since the judge's finding of fact that the defendant was responsible for the defective works, there was no compelling reason to disturb the finding and award of the judge who found that the claim was supported by invoices and payment vouchers (see paras 55–56).

[Bahasa Malaysia summary

Responden ('plaintif') dilantik sebagai kontraktor utama oleh Ann Joo Integrated Steel Sdn Bhd ('majikan') bagi pembinaan satu projek. Plaintif melantik perayu ('defendan') sebagai subkontraktornya bagi projek tersebut. Plaintif menerima RM4,404,350.32 daripada majikan manakala plaintif membayar kepada defendan sejumlah RM1,863,629.57 bawah subkontrak. Plaintif menuntut terhadap defendan di Mahkamah Tinggi bagi ganti rugi pelanggaran kontrak dan mendakwa defendan: (a) cuai dalam menjalankan kerja-kerja subkontrak; (b) mempunyai kualiti kerja yang rendah; (c) dengan

salah, menangguhkan kerja; dan (d) enggan menjalankan kerja-kerja pembaikan kecacatan dan mengabaikan kerja-kerja. Akibatnya, plaintif mengalami kerugian dan terpaksa mengambil pihak ketiga untuk membaiki kerja-kerja yang cacat dan menyempurnakan projek. Membantah tuntutan, defendan menghujahkan mereka bukanlah subkontraktor sebenar bagi keseluruhan projek tetapi mereka hanya dilantik oleh plaintif untuk membekalkan buruh untuk mencurah simen dan kerja-kerja lain. Oleh itu, rayuan defendan terhadap kuantum. Isu yang timbul bagi pemutusan mahkamah adalah sama ada pelbagai jumlah yang diperintahkan oleh hakim yang perlu dibayar oleh defendan kepada plaintif boleh dikekalkan bawah undang-undang atau fakta.

Diputuskan, membenarkan sebahagian rayuan:

(1) Berlaku pelanggaran keadilan asasi kerana defendan tidak diberi peluang untuk menyangkal hujahan lanjut plaintif dan penerangan tentang jumlah, khususnya apabila hakim telah membuat dapatan bahawa tiada keterangan untuk menyokong tuntutan plaintif bagi ganti rugi. Walau bagaimanapun, isu ini, dengan sendirinya, tidak menjejaskan award-award yang dibuat oleh hakim (lihat perenggan 34).

(2) Hakim bicara terkhilaf dalam mengawardkan pampasan munasabah sebanyak RM338,585 kepada plaintif. Memandangkan hakim telah membuat dapatan bahawa plaintif tidak membuktikan tuntutannya bagi ganti rugi, award RM338,585 bagi pampasan munasabah tiada asas dan salah bawah fakta dan undang-undang (lihat perenggan 43–44).

(3) Bagi empangan kekotak, hakim mendapati bahawa rekaan cerucuk keping membentuk kewajipan kontraktual defendan bawah subkontrak dan bahawa defendan telah mengabaikan pembangunan cerucuk keping. Hakim seterusnya memutuskan bahawa defendan cuai dalam menjalankan pembangunan bunker bijih. Tiada sebab-sebab yang memaksa mengganggu dapatan hakim. Dapatan tersebut tidak bertentangan tetapi disokong oleh keterangan. Hakim membenarkan jumlah RM849,376.01, seperti yang diplidkan, selepas memutuskan bahawa tuntutan ini disokong oleh penghantaran tempahan dan invois. Tiada sebab untuk mengganggu award hakim bagi item cerucuk keping (lihat perenggan 45–46 & 48).

(4) Hakim mengawardkan sejumlah RM201,057 iaitu lebihan bayaran yang dibuat oleh plaintif kepada defendan akibat ugutan. Walau bagaimanapun, dalam keterangan, tidak disebut langsung tentang apa-apa ugutan atau paksaan oleh defendan yang berjumlah RM201,057. Laporan-laporan polis dibuat beberapa bulan kemudian oleh plaintif. Terdapat keterangan bahawa tiada ugutan fizikal oleh plaintif untuk membuat bayaran. Cebisan keterangan bahawa defendan

A tidak berani mengenakan keganasan fizikal menidakkan elemen ugut (lihat perenggan 51).

(5) Sejumlah RM102,678 dan RM15,800 diawardkan oleh hakim bagi cerucuk-cerucuk dan tiang-tiang senget yang, secara asasnya kos-kos untuk membaiki kerja-kerja defendan yang cacat. Oleh kerana dapatan fakta hakim adalah bahawa defendan bertanggungjawab atas kerja-kerja cacat, tiada apa-apa alasan yang memaksa untuk mengganggu dapatan dan award hakim yang memutuskan tuntutan tersebut disokong oleh invois dan bayaran-bayaran baucar (lihat perenggan 55–56).]

Notes

For cases on subcontract, see 3(3) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 4386–4409.

Cases referred to

Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy [2016] 5 MLJ 590, FC (refd)

Fateh Chand v Balkishen Das [1964] 1 SCR 515; AIR 1963 SC 1405, SC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd [2009] 4 MLJ 445; [2009] 4 CLJ 569, FC (folld)

Maula Bux v Union of India [1970] 1 SCR 928, SC (refd)

Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor [2010] 4 MLJ 577, FC (refd)

P'ng Hun Sun v Dato' Yip Yee Foo [2013] 6 MLJ 523, CA (refd)

SamaWorld Asia Sdn Bhd & Anor v RHB Bank Berhad (dahulunya dikenali sebagai DCB Bank Berhad) [2008] MLJU 1089; [2008] 6 CLJ 44, CA (refd)

Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817, FC (folld)

Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)

Legislation referred to

Contracts Act 1950 s 75

Mahinder Singh Dulku (Ong Yu Shin and Teh Ee Teng with him) (The Chambers of Yu Shin Ong) for the appellant.

Lim Hock Siang (Khoo Ching Chiat with him) (Presgrave & Matthews) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] This is the appellant/defendant's appeal against the decision of the High Court at Penang which entered judgment for the respondent/plaintiff. For ease of reference, in this judgment, parties will be referred to as they were in the High Court.

BACKGROUND

[2] The plaintiff was appointed as the main contractor by Ann Joo Integrated Steel Sdn Bhd ('the employer') for the construction of Ore Bunker and Hot Stove at Prai Industrial Park ('the project') at an accepted tender price of RM3m. The liquidated and ascertained damages payable by the plaintiff to the employer in the event of delay in the completion of the project was RM6,000 per day.

[3] By a letter dated 25 June 2008, the plaintiff appointed the defendant as its subcontractor for the said project. The total subcontract sum agreed by the plaintiff and the defendant was RM2m. The other terms and conditions for the subcontract were:

(a) the defendant was to start work within two weeks from the date of the letter of award, namely on or before 8 July 2007;

(b) the defendant was to complete the project within 16 weeks, namely on or before 27 October 2008; and

(c) the liquidated and ascertained damages for the delay in completing the project was at the rate of RM5,000 per day.

[4] The consulting engineer and the superintending officer for the project was Pakatan Runding Yusoff Sdn Bhd ('PRY').

[5] The plaintiff received a total sum of RM4,404,350.32 from the employer for the project while the plaintiff paid the defendant the amount of RM1,863,629.57 under the subcontract.

[6] The plaintiff contended that there was delay in the project which was caused by the defendant. The plaintiff brought an action against the defendant claiming for damages for breach of contract.

THE PLAINTIFF'S CLAIM

[7] Vide its amended statement of claim the plaintiff alleged that the defendant's following conduct, inter alia, had resulted in the plaintiff suffering

losses, namely that the defendant was negligent in carrying out the subcontract works; in the poor workmanship; in refusing to follow PRY's instructions; in wrongfully suspending the works; in refusing to rectify defective works and in abandoning the works. Consequently, the plaintiff engaged a third party to rectify the defective works and to complete the project.

[8] The plaintiff claimed for the following specific sums (see para 48(c)–(m) of the amended statement of claim):

(a) RM1,825,000 being liquidated and ascertained damages ('LAD') for the delay in completing the project from 8 October 2008–30 December 2009;

(b) RM849,376.01 to complete the design and construction of 'cofferdam' which was abandoned by the defendant;

(c) RM102,678 for rectification of the damaged or 'tilted piles';

(d) RM201,057 being excess payment made to the defendant under coercion and threat;

(e) RM15,800 being cost for the rectification of defective columns and other concreting works;

(f) RM9,690.20 being the loss of use of RM213,067.70 for 332 days at the rate of 5%pa calculated from 1 December 2008–28 October 2009 (the date when PRY released the said amount to the plaintiff);

(g) RM54,848 being the cost incurred by the plaintiff to complete the project abandoned by the defendant in September 2009;

(h) RM30,465.60 for the labour charges in excess paid to the defendant after the final confirmation on the quantities of reinforcement steel bar and concretes;

(i) RM16,870 being the amount charged by the employer for road access and other maintenance charges which ought to be borne by the defendant;

(j) RM810 for the repair of cable damaged by the defendant; and

(k) RM1,540 for the reimbursement of the purchase of waterproof plywood by the plaintiff for the defendant.

[9] The plaintiff also sought for the relief of general damages to be assessed and for exemplary damages.

[10] In defending the claim, the defendant took the position that they were not the subcontractor for the whole project but they were only appointed by the plaintiff to supply labour for concrete pour and rebar works. The defendant

further contended that they had completed about 98% of the subcontract works.

[11] The defendant counterclaimed for the sum of RM1,440,388.93 and/or general damages, in the alternative, for an order that damages be assessed by the senior assistant registrar of the High Court. The amount of RM1,440,388.93 comprised the contractual works that were carried out by the defendant, which were calculated based on the re-measurement of quantities and the final account issued by the quantity surveyor, JUBM Sdn Bhd ('JUBM') for the main contract between the plaintiff and the employer.

[12] In the High Court, the issues canvassed were whether the defendant was the subcontractor for the entire project and whether the delay in the completion of the works was caused solely by the defendant's negligence and breach of contract.

[13] After a full trial, the learned judge found that the defendant was appointed by the plaintiff as a subcontractor for the entire project; that there was a delay in the project and that the defendant was negligent in carrying out the subcontract works. Her Ladyship further found that the defendant was solely responsible for the delay by the defendant's following acts and omissions:

(a) delay by the defendant in the design of the cofferdam;

(b) delay caused by the defendant arising from slope collapse at the ore bunker which had resulted in the lateral movement of the existing piles located nearby;

(c) delay arising from the plaintiff having to take over the design, supply and installation of the sheet pile cofferdam work abandoned by the defendant;

(d) delay arising from the plaintiff having to rectify the tilted piles which the defendant refused to do;

(e) delay caused by the defendant arising from defective concreting works, in particular the defective columns which resulted in numerous stop work orders issued by PRY;

(f) delay arising from rectification of defective columns constructed by the defendant;

(g) delay arising from the defendant's wrongful suspension of work in February/March 2009; and

(h) delay arising from the defendant's refusal to allow the plaintiff to complete the project.

[14] Hence, except for para 48(c) of the amended statement of claim, all the other claims listed by the plaintiff in para 48(d)–(m) were allowed as prayed. As for para 48(c), the learned judge disallowed the LAD for the delay in the sum of RM1,825,000. Her Ladyship instead allowed the amount of RM338,585 as reasonable compensation.

[15] In respect of the counterclaim, the learned trial judge found that it was excessive, baseless and not supported by document. Having found that the defendant had failed to prove the counterclaim, the same was dismissed with costs.

[16] Aggrieved by the decision of the High Court, the defendant appealed to this court.

THE APPEAL

[17] Before us, the defendant's complaint was essentially directed towards the quantum, namely the awards for:

(a) reasonable compensation in the sum of RM338,585;

(b) cost to complete the design and construction of cofferdam abandoned by the defendant in the sum of RM849,376.01;

(c) excess payment to the defendant under threat and other awards totalling RM201,057; and

(d) rectification of the tilted piles and columns in the sum of RM102,678 and RM15,800 respectively.

[18] Learned counsel for the defendant submitted that there was a grave error of law and misdirection by the High Court in respect of the claim for LAD as the plaintiff did not adduce any evidence to support its claim for the LAD in the sum of RM1,825,000. As for the amount of RM338,585, the learned judge did not explain how she arrived at that figure. Further, it was established at the trial that the employer did not in fact impose any LAD on the plaintiff as the main contractor.

[19] In the absence of any evidence supporting the claim for the LAD, learned counsel submitted that the learned judge ought to have dismissed the plaintiff's entire claim for LAD. Reliance was placed on the judgment of the Federal Court in *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 and *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445; [2009] 4 CLJ 569.

[20] For the plaintiff, learned counsel submitted that in allowing the claim

of RM338,585, the learned judge had in fact followed the law in *Selva Kumar* and that the amount was awarded based on the evidence of actual loss suffered by the plaintiff.

COFFERDAM

[21] Learned counsel for the defendant submitted that the learned trial judge erred in her finding on delay and in allowing RM849,376.01 being cost to complete the design and construction of cofferdam abandoned by the defendant. In reply, learned counsel for the plaintiff submitted that the learned judge's finding and award in respect of the cofferdam was based on documentary and oral evidence, hence there was no ground for appellate intervention.

PAYMENT UNDER THREAT

[22] In respect of the learned judge's order that the defendant pay the plaintiff the sum of RM201,057 being excess payment made by the plaintiff to the defendant under threat, learned counsel for the defendant submitted that the learned judge's finding that there was threat was against the weight of evidence having regard to the admission of the plaintiff's project manager, Chau Hoo Wan ('PW6') under cross-examination.

[23] Learned counsel highlighted the relevant part of the evidence of PW6 and documentary evidence to support his argument that the learned judge ought to have dismissed the plaintiff's allegation of threat as being without any substance whatsoever and ought not to have awarded the above sum to the plaintiff.

[24] On the learned judge's finding that the defendant's work was defective and of poor quality and had subsequently resulted in a delay to complete the project, learned counsel for the defendant submitted that learned counsel for the plaintiff had failed to put this key aspect of their case to the defendant's witnesses and was therefore barred from submitting on this point.

TILTED PILES AND COLUMNS

[25] On the amount of RM102,678 in respect of rectification of tilted piles and RM15,800 in respect of columns, learned counsel for the defendant submitted that the plaintiff had no cause of action against the defendant in respect of this claim as the piling works did not fall under the defendant's scope of work and the ultrasonic velocity tests carried out established that only two out of nine columns tested were of questionable quality. For the award under this claim, the defendant conceded that the plaintiff was entitled to

RM54,000. Except for RM54,000, the defendant prayed that the order of the learned judge be set aside.

COUNTERCLAIM

[26] The counterclaim was initially for RM1,220,398.80 but was amended to RM1,440,388.93 based on the final account prepared by JUBM. The breakdown of the counterclaim includes the re-measurement and the variation orders instructed by the plaintiff less payment received by the defendant. Learned counsel for the defendant submitted that the learned trial judge fell into deep error in law and in fact in totally ignoring the final account issued by JUBM.

BREACH OF NATURAL JUSTICE

[27] The defendant also raised the issue of breach of natural justice. In this regard learned counsel referred to the notes of proceedings dated 26 September 2016 when the learned judge delivered her decision. Having found the defendant solely responsible for the delay, Her Ladyship said (record of appeal Vol 2B Pt 6: p 1435):

> Court: For prayer (c) and (*sic*) order for the Defendant to pay forthwith to the Plaintiff liquidated and assorted (*sic*) damages, LAD RM1.8 million. Of course in the contract document it is mention for the delay, for 1 day delay Defendant is supposed to pay to the Plaintiff RM5,000 or RM6,000 damages per day *kan*? But I notice there is no evidence whatsoever a claim for LAD by the employer Ann Joo against the Plaintiff; there is no claim *kan* for LAD? So I think Plaintiff is not entitled to claim for LAD *lah* for RM1.8 million.
>
> I also notice in your submission alternatively the Plaintiff is asking more than 300,000.00 GD, I wouldn't know what is the basis of your qualifying 300,000 over *kan*?
>
> PC: Is inside our submission, overhead cost for prolongation time for variation supervises cost and insurance.
>
> Court: But there must be evidences before I cannot simply look at the figure, there must be evidence supporting the figure. Overhead cost how much you know etc etc. There is no evidence to that defect (*sic*) so I'm thinking how this figure came about *kan*?
>
> PC: My Lady, if we put it inside the evidence in SP6.
>
> Court: No but still whatever damages you claim, general or special damages there must be evidence you have got to proof *kan*?

[28] What is clear from the above is that the learned judge found that the plaintiff had not proved its claim for general damages for RM300,000 over. Thereafter, there was a long explanation by counsel for the plaintiff (see record

of appeal Vol 2(B) Pt 6: pp 1436–1441) justifying the said claim.

[29] The following exchanges then took place between the learned judge and the defendant's counsel (record of appeal Vol 2(B) Pt 6: pp 1441–1442):

> Court: So for prayer C, claim for RM1.8 million is not allowed. I only allowed claim for RM338,585.00.
>
> DC: My Lady I believe that this is inaccurate, if I may on the 300 over thousand.
>
> Court: No you can't ... today is for decision, i'm asking the Plaintiff to clarify and nobody can stop. This is court discretionary power you know.
>
> DC: I agree My Lady, but can I just give rebuttal on this or My Lady saying that ...
>
> Court: No, no. You can appeal right up to Federal Court. Because I have no doubt whatsoever, the main problem in this case is cause (*sic*) by the Defendant conduct; unreasonable conduct alright.

OUR FINDINGS

[30] Broadly, the issue for our determination is whether the various amounts ordered by the learned judge to be paid by the defendant to the plaintiff can be sustained as being correct in law or fact.

[31] The principles on appellate interference with findings of fact by the trial court are trite and well established. An appellate court will not overturn the trial court's findings unless it is entirely satisfied that the findings are clearly wrong and could not possibly be justified on the evidence. Hence, unless the trial judge is plainly wrong in his findings; or by reason of some misdirection or non-direction or otherwise, the trial judge erred in accepting the evidence; or the trial judge has taken into account some matter which he ought not to have taken or he failed to take into account some matter which he ought to have taken; or from the evidence itself or from the unsatisfactory reasons given by the trial judge for accepting it, it appears un-mistakenly that he could not have taken proper advantage of having seen or heard the witnesses; or insofar as the trial judge relied on demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, the appellate court should not reverse the findings of fact by the trial judge (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309; *SamaWorld Asia Sdn Bhd & Anor v RHB Bank Berhad (dahulunya dikenali sebagai DCB Bank Berhad)* [2008] MLJU 1089; [2008] 6 CLJ 44; *Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor* [2010] 4 MLJ 577; *P'ng Hun Sun v Dato' Yip Yee Foo* [2013] 6 MLJ 523).

[32] Before we proceed further, we will first deal with the issue of breach of

natural justice. Whilst trial judges are at liberty to seek clarification from parties before making any decision, on the factual matrix of the instant appeal, we are of the view that the learned judge had seriously misdirected herself in allowing the plaintiff's counsel to clarify when Her Ladyship had made a finding that there was no proof on the amount claimed by the plaintiff. Clarification cannot improve the plaintiff's unproven case. Clarification can only be sought when the plaintiff has proved its claim but for instance, due to some discrepancies in the amounts, the judge needs clarification for better comprehension of the amounts or figures claimed.

[33] Further, it is trite that in an adversarial system, both parties must be heard before the court comes to its decision (see *Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy* [2016] 5 MLJ 590). What happened in the instant appeal as clearly reflected in the sealed order was (ROA Vol 1(A): p 46):

> ... *DAN SETELAH MAHKAMAH INI* memanggil untuk klarifikasi daripada Lim Hock Siang, peguam pihak plaintif sahaja pada hari ini...

[34] We therefore find merits in the complaint by the defendant that there had been a breach of natural justice as the defendant's counsel was not accorded the opportunity to rebut the plaintiff's further submission and clarification on the amount, especially when the learned judge had made a finding that there was no evidence to substantiate the plaintiff's claim for damages. Nevertheless, we are of the view that this issue in itself does not vitiate the awards made by the learned judge, which we will now deal on the merits.

THE LAD/REASONABLE COMPENSATION

[35] The learned judge disallowed the plaintiff's pleaded claim for LAD but nevertheless allowed a sum of RM338,585 as reasonable compensation to the plaintiff. The basis for the award is because the defendant was responsible for the delay in the completion of the subcontract works (appeal record Vol 1A: p 83). At this juncture it is pertinent to reiterate that the employer did not in fact impose any LAD on the plaintiff.

[36] It is an established principle of law that the plaintiff must prove its losses before it is entitled to damages or reasonable compensation. In *Selva Kumar*, the Federal Court was called upon to interpret s 75 of the Contracts Act 1950 ('the Contracts Act') which reads:

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so

named or, as the case may be, the penalty stipulated for. A

[37] For ease of reference we reproduce the relevant judgment of the Federal Court delivered by Peh Swee Chin FCJ where at pp 824–825 His Lordship said: B

> In *Bhai Panna Singh v Bhai Arjun Singh* AIR 1929 PC 179, an Indian appeal in the Privy Council in connection with a provision in a contract for the party in breach to pay Rs10,000, Lord Atkin said in connection with s 74 of the Indian Contract Act 1872 (corresponding to the section in question in our Act), held:
>
> > The effect of s 74 of the Contract Act of 1872 is to disentitle the plaintiffs to recover simpliciter the sum of Rs10,000, whether the penalty or liquidated damages. The plaintiffs must prove the damages they have suffered. C
>
> In that case, the plaintiffs managed to prove as their actual damage, the sum of Rs500 which they recovered. D
>
> Lord Hailsham in *Linggi Plantations Ltd v Jagatheeson* [1972] 1 MLJ 89 observed at p 92 that the section 'was intended to cut through the rather technical rules of English law relating to liquidated damages and penalties ...'.
>
> In *Maniam v The State of Perak* [1957] MLJ 75, the object of the section in question suggested by Pollock and Mulla, the joint authors of the *Indian Contract and Specific Relief Acts*, was repeated by Thomson J (as he then was) with approval ... but unfortunately the section in question was found by his Lordship to be irrelevant to the facts of that case, and consequently there was no expounding on the words in question. E
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> The view of Lord Atkin was adopted in our High Court case, viz *Wearne Brothers (M) Ltd v Jackson* [1966] 2 MLJ 155, though the learned trial judge, while correctly holding that in a provision in a contract amenable to the section in question, the plaintiffs must prove damages they had suffered, erred in saying further (at p 156) that, 'unless the sum ... is a genuine pre-estimate'. It must be remembered that the expression 'liquidated damages' is the name for the contracting parties' supposedly genuine pre-estimate of the loss to the innocent contracting party when the contract is broken by the other. Every such provision to which the section in question is applicable is to be regarded effectually as a penalty and is therefore void or unenforceable. F G

[38] The Federal Court in *Selva Kumar*, then went on to refer to the case of *Fateh Chand v Balkishen Das* [1964] 1 SCR 515; AIR 1963 SC 1405. Having set out the facts and the decision of the Indian High Court and the Supreme Court in relation to the section in question, the Federal Court stated as follows at p 826: H I

> The ratio of the case seems to be that such 'reasonable compensation' must be proved according to the usual principles, and the court undertakes a consideration of the evidence adduced to see if there is any such proof or such evidence of such actual damage or loss. If there is no such evidence, there will be no award of such

reasonable compensation. This ratio seems to be in accord with the view of Lord Atkin set out above.

[39] The second Indian case that was referred to in *Selva Kumar*, was *Maula Bux v Union of India* [1970] 1 SCR 928. As regards *Maula Bux*, the Federal Court made the following observation at pp 827–829:

> ... what is far more interesting in that case is that the Indian Supreme Court, when referring to the words in question, ie 'whether or not actual loss or damage was proved to have been caused thereby' stated that the words in question were intended to cover two kinds of contracts. In the first kind, the court would find it very difficult to assess such reasonable compensation. In the second kind, the court could assess such reasonable compensation with settled rules. Such dichotomy of contracts by the Indian Supreme Court represents, in our view, a logical basis for the words in question, words added by the legislature to the section in question without seemingly any thoughtfulness about the desirability of some appropriate limitations thereto. We agree with the Indian Supreme Court's dichotomy of such contracts.
>
> Secondly, we therefore further hold that the words in question, viz 'whether or not actual damage was proved to have been caused thereby', are limited or restricted to those cases where the court would find it difficult to assess damages for the actual damage or loss, as distinct from or opposed to all other cases, when a plaintiff in each of them will have to prove the damages or the reasonable compensation for the actual damage or loss in the usual ways.
>
> ...
>
> Thirdly, therefore, we hold that the precise attributes of such contracts in which it is difficult for a court to assess damages for the actual damage or loss, are cases where there is no known measure of damages employable, and yet the evidence clearly shows some real loss inherently and such loss is not too remote; then the court ought to award, not nominal damages, but instead, substantial damages not exceeding the sum so named in the contractual provision, a sum which is reasonable and fair according to the court's good sense and fair play.
>
> Fourthly, we hold that in any case where there is inherently any actual loss or damage from the evidence or nature of the claim and damage for such actual loss is not too remote and could be assessed by settled rules, any failure to bring in further evidence or to prove damages for such actual loss or damage, will result in the refusal of the court to award such damages, despite the words in question.

[40] In *Johor Coastal Development*, two questions of law were posed for determination by the Federal Court, one of which reads:

> Whether that part of the decision in *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 which obliges a party having the benefit of a liquidated damages clause to prove its losses, notwithstanding the words in s 75 of the Contracts Act 1950 'whether or not actual damage or loss is proved to have been caused thereby', is correct.

[41] By majority, the Federal Court held that *Selva Kumar*, is still good law. **A**

[42] Applying the decision in *Selva Kumar* and the majority decision in *Johor Coastal Development*, we agree with learned counsel for the defendant that the learned trial judge erred in awarding reasonable compensation to the plaintiff in the sum of RM338,585. **B**

[43] It was contended by learned counsel for the plaintiff that the plaintiff had adduced the evidence on the actual loss suffered to justify the award of reasonable compensation of RM338,585. Learned counsel referred to the evidence of PW6 at QA 133D of his witness statement. Having perused the said evidence, we find that it does not support the actual loss of RM338,585 (record of appeal Vol 2B Part 7: pp 1588 and 1593–1594). **C**

[44] Given that the learned judge had made a finding that the plaintiff had not proved the claim for damages and on the authority of *Selva Kumar*, we are constrained to hold that the award of RM338,585 for reasonable compensation had no basis and was wrong in fact and in law. **D**

COFFERDAM **E**

[45] In respect of cofferdam, the learned judge found that the design of the sheet pile cofferdam formed part of the defendant's contractual obligation under the subcontract and that the defendant had abandoned the construction of the cofferdam. The learned judge further found that the defendant was negligent in carrying out the construction of the ore bunker. For ease of reference we reproduce the relevant part of the judgment on this aspect (record of appeal Vol 1A: pp 78–79): **F**

> In order to construct the ore bunker, the defendant was required to design and construct a sheet pile cofferdam as a temporary work before the ore bunker can be constructed. It is an established fact that the sheet pile cofferdam is the only item of work which require the defendant to design the work. All other works were based on PRY's design. Under the defendant's work program for ore bunker, the defendant was required to install 3 rows of temporary sheet piles by 10.9.2008. However, the defendant failed to install the sheet piles. Instead, the defendant had proceeded with excavating below 6 m depth and dumped the excavated materials on site. This resulted in the collapsed of the excavated slope and lateral movement of the immediate row of piles adjacent to the excavation pit on 15.9.2008. This incident was confirmed by PRY in its letter dated 15.9.2008 (exhibit P23) which states: **G** **H** **I**
>
> > You have proceeded with the excavation for ore bunker loading pit without any temporary sheet piling. We have also notice that you have dumped excavated material beside the excavation thereby imposing additional surcharge on the excavation pit. We have instructed you to remove this excavated material from the excavation pit on 12.9.2008.

> The collapsed of the excavated slope is clear proof that the defendant was negligent in carrying out the construction of the ore bunker. Therefore the defendant's contention that they are not responsible for the collapse of the ore bunker loading pit is baseless. This is just one example of the many sloppy jobs carried out by the defendant. Finally, DW1 informed PW6 that the defendant did not wish to continue on with the design and construction of the sheet pile cofferdam work anymore as they had under quoted for this item of work. When the plaintiff had to complete the design and construction of the sheet pile cofferdam works at a cost of RM979,376.01, the defendant contend the plaintiff had pre-planned to take over the defendant's works. This allegation is baseless because it is a clear case of the defendant had abandoned the work and the plaintiff had no choice but to engage a third party to complete the work ...

[46] We find no compelling reason to disturb the finding of the learned judge. The above finding was not perverse but supported by evidence.

[47] The plaintiff vide para 48(d) of the amended statement of claim pleaded the amount of RM849,376.01 being the cost to complete the design and construction of cofferdam which was abandoned by the defendant. In the course of the trial, through PW6, the plaintiff's claim increased to RM979,376.01 (see QA 38 of PW6's witness statement). The breakdown of the claim as per the evidence of PW6 is as follows:

(a) rental of sheet piles from Oriental SP Sdn Bhd — RM227,020.01;

(b) sheet piling, walling/strutting and jet grouting works by LT Piling Sdn Bhd — RM648,771;

(c) supply of cement by E&B Engineering (M) Sdn Bhd — RM91,200;

(d) hire of excavator and lorry from Wajib Pile Concrete Product Sdn Bhd — RM3,635;

(e) pressure grout to plug water at the base of loading pit by Tong Enterprise — RM8,250; and

(f) after the completion of the cofferdam and extraction of the temporary sheet piles, the defendant refused to backfill and compact the void left behind. The plaintiff hired Wajib Pile Concrete Product to carry out the backfilling work at a total cost of RM500.

[48] The learned judge allowed the sum of RM849,376.01 as pleaded, having found that this claim was supported by delivery orders and invoices in exhs P55–P58. We find no reason to disturb the learned judge's award for the item of cofferdam.

EXCESS PAYMENT MADE UNDER THREAT

[49] Vide para 25 of the amended statement of claim, the plaintiff pleaded that:

> 25. ... Malahan Defendan telah dengan salahnya menggunakan ugut peras untuk memaksa ('coerce') Plaintif membuat bayaran yang melebihi harga yang dipersetujui di bawah Kontrak Kecil tersebut kepada Defendan:
>
> (a) ... RM12,550.00 untuk kerja-kerja 'Ore Bunker Loading Pit Excavation' ...;
>
> (b) ... RM43,227.00 untuk kerja-kerja 'Cofferdam Loading Pit Open Cut Excavation down to 5m ...';
>
> (c) ... RM53,480.00 untuk kerja-kerja 'Hopper Construction' ...;
>
> (d) ... RM91,800.00 untuk 'General Preliminaries' ...

[50] In respect of the above claim, PW6 testified as follows (appeal record Vol 2B Pt 7: p 1535):

> The Defendant at that time demanded from us the following items which were in excess of what they were entitled to under the sub contract:
>
> (a) The sum of RM70,000.00 for loading pit excavation as a variation order. This was RM12,550.00 more than what the Defendant was entitled to under Item 2.4(b) of the Defendant's Quotation at RM57,450.00 as pleaded in paragraph 25(a) of the statement of claim and it is not a variation order.
>
> (b) On top of the RM70,000.00, an additional sum of RM43,227.70 for the same loading pit excavation which the Defendant wrongfully claimed as another variation order as pleaded in paragraph 25(b) of the statement of claim.
>
> (c) The additional sum of RM91,800 for general conditions and preliminaries above the RM60,000.00 quoted by the Defendant under Bill No 1 as pleaded in paragraph 25(d) of the statement of claim.
>
> (d) The sum of RM53,480.00 in respect of Hopper Construction which was in excess of the agreed sum of RM346,500.00 as pleaded in paragraph 25(c) of the statement of claim. This is so because the parties had agreed as recorded in the Plaintiff's letter to the Defendant dated 15.5.2008 that the Defendant would be paid for the construction of 7 units hoppers at G/L 6–8 and G/L 14–16 at the rate of RM17,500 per unit. This works out to be RM346,500.00 in total for all the 19 numbers of hoppers to be constructed. However, the Defendant claimed from the Plaintiff an additional sum of RM53,480.00 on top of the agreed sum of RM346,500.00.

[51] The learned judge awarded the sum of RM201,057 being excess

payment made by the plaintiff to the defendant under threat. However, in the evidence as reproduced above, there was absolutely no mention of any threat or coercion by the defendant in respect of payment of RM201,057. We do not lose sight of the fact that the plaintiff lodged police reports on the alleged threat by the defendant. However, the police reports were lodged months later and more importantly, PW6 admitted in cross-examination that he had no evidence of the physical threat for the plaintiff to make payment. PW6 further stated that the threat was verbal and that the defendant would not dare to beat him up for payment (record of appeal Vol 2B Pt 2: p 516). This piece of evidence that the defendant dare not inflict any physical violence on PW6 in our view negates the element of threat. And it is highly improbable that the plaintiff would pay the defendant RM201,057based on a threat which in any event PW6 knew would not materialise.

[52] PW6 referred to three letters dated 17 February 2009 (exh P163), 24 February 2009 (exh P161) and 2 March 2009 (exh P164) which according to him were in relation to stoppage of work by the defendant since February 2009 unless the defendant's demands for payments beyond what the defendant was entitled to were met. We have perused the exhibits (appeal record Vol 2C Pt 9: pp 3326, 3328–3329) and we find, contrary to the evidence of PW6, that those letters made no reference to payment under threat or coercion. The letters also did not state that the defendant had been paid over and above what they were entitled to.

[53] Further, the answers elicited during cross-examination of PW6 showed that payment of RM43,227.70 was made pursuant to a joint site measurement on the revised additional works done by the defendant while RM91,800 was payment made pursuant to the approval of the plaintiff's headquarters. There was no issue or evidence of threat or coercion in respect of these payments.

[54] As it is always a safer approach to test the oral evidence of a witness against the contemporaneous document, it is our judgment that the plaintiff has not proved the claim under para 25 of the amended statement of claim. The learned judge's award of RM201,057 being excess payment made to the defendant under threat was thus contrary to contemporaneous documents which show that payments were legitimately made by the plaintiff to the defendant (see *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229).

RECTIFICATION OF THE TILTED PILES AND COLUMNS

[55] A sum of RM102,678 and RM15,800 was awarded by the learned judge for the tilted piles and columns respectively, which essentially were costs to rectify the defective works of the defendant.

[56] Since we accept the learned judge's finding of fact that the defendant was responsible for the defective works, we find no compelling reason to disturb the finding and award of the learned judge who found that the claim was supported by invoices and payment vouchers.

THE COUNTERCLAIM

[57] The defendant pleaded the sum of RM1,440,388.93 and/or general damages to be paid by the plaintiff to the defendant. In the alternative, the defendant sought for an order that such damages be assessed by the senior assistant registrar of the High Court.

[58] At the trial, the managing director of the defendant, Ong Chang Say ('DW1') testified as to the amounts allegedly owing by the plaintiff to the defendant pursuant to the re-measurement and final account issued by JUBM. The learned judge found that the counterclaim was excessive and baseless and that the defendant failed to prove that they were entitled to the sum of RM1,440,388.93.

[59] Before us, the defendant adjusted the counterclaim to RM1,252,648.23. This figure is likewise based on the plaintiff's final account as prepared by JUBM. The quantification (after concession on some of the plaintiff's claim without admission of liability) as submitted by learned counsel is as follows (para 7 of the appellant's supplementary submissions):

· JUBM Final Account paid for works	RM4,404,350.32
· (minus) Progressive payments made	– RM1,863,627.57
· (minus) 2% of works left — RC Roof	– RM10,000
· (minus) plaintiff claimed of total works not done	– RM1,219.226.52
· (minus) cost of taking over abandoned works	– RM54,848
Total adjusted due to the defendant:	RM1,252,648.23

[60] However, at the close of the submission, the defendant settled for the figure of RM577,925.80 as per the following quantification through a one page document tendered by learned counsel:

1.	Total works done :	RM2,001,157
	Less Progress Claims paid :	RM1,863,627.57
		RM137,529.43
	Plus Retention Sum :	RM78,554.85
		RM216,084.28
2.	Plus Variation Orders by JUBM :	RM361,841.52

Total : RM577,925.80

[61] For the plaintiff, learned counsel submitted that the counterclaim tendered through a one page document for RM577,925.80 should be rejected because it was in total departure from the basis of counterclaim canvassed by the defendant in the High Court.

[62] We agree with the plaintiff. In pursuing the counterclaim, the defendant had given three different figures, the first was RM1,440,388.93 where the defendant relied on the final account of JUBM as found in appeal record Vol 2(C) Pt 11: pp 3677–3726. The second figure was RM1,252,648.23 which was also based on JUBM and the third was RM557,925.80, where the defendant sought for a lesser figure without proof.

[63] The different amounts relied on by the defendant, in our view, fortified the learned judge's finding that the defendant had not proved the counterclaim. On our part, we are not prepared to enter judgment on the counterclaim for the sum of RM577,925.80 based on the one page document submitted by learned counsel, without any evidence from the defendant's witnesses.

[64] As for the final account issued by JUBM for the main contract between the plaintiff and the employer, we are of the view that it is erroneous for the defendant to rely on the final account for the following reasons:

(a) the defendant is not a party to the main contract;

(b) the final account is based on the rates agreed between the plaintiff and the employer in the main contract;

(c) the rates agreed between the plaintiff and the defendant in the subcontract are different from the rates agreed between the plaintiff and the employer in the main contract; and

(d) bearing in mind the learned judge's finding of fact that the defendant had breached the subcontract in not carrying out the works and that the works were completed by the plaintiff through a third party, the final account for the main contract would not just reflect the works of the defendant.

[65] In any event, the learned judge had evaluated the evidence on the counterclaim as can be seen from the grounds of judgment (record of appeal Vol 1A: pp 87–92). We find no appealable error in Her Ladyship's evaluation of the evidence as regards the counterclaim.

CONCLUSION

[66] To conclude, we allow the defendant's appeal in part. The decision of the learned judge in allowing the plaintiff's claim and dismissing the defendant's counterclaim is affirmed except the award for reasonable compensation in the sum of RM338,585 and the amount of RM201,057 for payment made under threat, is set aside. Each party to bear their own costs.

Appeal allowed in part.

Reported by Afiq Mohamad Noor